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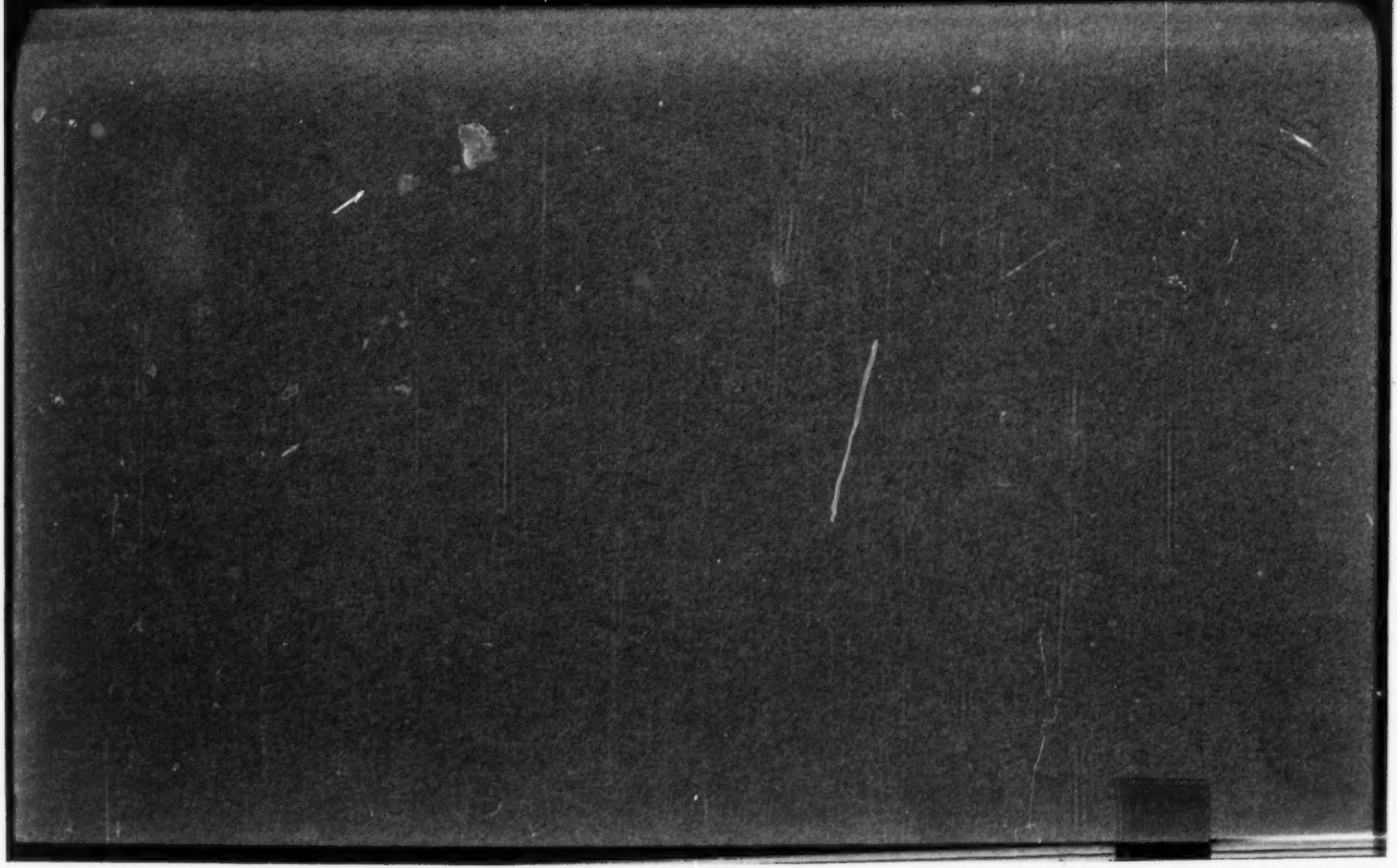

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IN THE

Supreme Court of the United States

OCTOBER TERM 1955

NO._____

JAMES RICHARD BOWDEN,
Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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The Petitioner respectfully prays for writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above entitled case.

Opinions Below

The memorandum findings of fact and opinion of the Tax Court is found in T. C. Memo. 1955, 284, (R 68-74). The opinion of the Court of Appeals for the Fifth Circuit (R 94-103) is reported in 235 F. (2d) — and set out in the Appendix, infra.

Grounds for Granting the Writ

Petitioner says that the decision below is in conflict with the decisions of this Court on each of the following three separate legal principles, to wit,

(a) Petitioner's evidence on value consisting of the "cost of duplicating" the annuity was denied the probative force and

effect for such evidence as announced by this Court in *United States vs. Ryerson,* 312 U. S. 260 and *Guggenheim vs. Rasquin* 312 U. S. 254, and

(b) The procedural presumption in favor of the Commissioner's assessment was given the force and effect of evidence, and upheld in the face of and against cogent evidence of Petitioner, contrary to the decisions of this Court in *Heiner vs. Donnan,* 285 U. S. 312, *Del Vecchio vs. Bowers* 296 U. S. 280, *Western Atlantic Railroad vs. Henderson* 279 U. S. 639, *Manley vs. Georgia* 279 U. S. 1, and *New York Life Insurance Co. vs. Gamer,* 303, U. S. 161, and

(c) If it were a decision of expediency to simplify the administration of tax laws, it is in conflict with the ruling of this Court in *Heiner vs. Donnan,* supra, where at Page 325 the Court held that the individual may not be stripped of his constitutional rights for such expediency.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on June 30th, 1956. Order denying Petitioner's motion for rehearing was made and entered July 28th, 1956. Jurisdiction of this Court is invoked under 28 USCA, Sec. 1254 (1).

Question Presented

Whether under Section 1005 of the Internal Revenue Code of 1939 the Court of Appeals properly affirmed the Tax Court's decision sustaining the Commissioner's determination as to the value of a gift in trust made by the taxpayer in 1950.

Constitutional Provision and Statute Involved

Constitution of the United States, Amendment V. Due process of law, pertinent portion follows:

> *"No person shall — be deprived of life, liberty, or property without due process of law; - - -."*

Internal Revenue Code of 1939, Section 1005. Gifts made in property:

> *"If the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift." (26 U.S.C.A. [1952] 1005).*

Statement

The facts set forth in the following statement were stipulated, and found by the Tax Court to be as stipulated.

Petitioner, James Richard Bowden, and his two sisters, in 1950, created an irrevocable trust by a written agreement with Trust Company of Georgia. (R-28). The donors, contributing equally, transferred to the trustee assets of a value of $301,-177.43. The contribution of the petitioner to the trust res was of the value of $100,392.48. Petitioner was then fifty-two years of age. The trust agreement provided for payment of $400.00 per month to each donor for life. The rights to these payments inured, upon the death of a donor, to his or her lineal heirs with gifts over if no lineal heirs survived. The agreement provided that the trust is to terminate a year after the death of the last surviving donor. Other provisions of the agreement are not material to the issue presented.

Petitioner returned for Federal gift tax the remainder after his equitable life interest in the trust. In valuing the remainder Petitioner assigned insurance companies' valuation to his life annuity, deducted it from the amount of the assets he transferred to the trustee, and reported the difference as the value of the remainder. The Commissioner rejected this method of valuation and instead used the tables set out in Regulation 108, 86.19 (f & g) and held the annuity value to be $58,081.77 and the taxable gift $42,310.71. Petitioner appealed to the Tax Court and at the trial offered as evidence of the value of his retained-interest annuity the prices (stipulated) of the Prudential, and Aetna insurance companies for the identical an-

nuity ($93,680), which when deducted from his original res left $6,712.48 as petitioner's valuation of his taxable gift. The Commissioner offered no evidence on the value. The Tax Court sustained the Commissioner and the Court of Appeals affirmed. The controversy is over the value of the gift for gift tax purposes under the law and evidence.

Argument

The reason the decision below is not in accord with the said decisions of this Court is that the "*economic benefit*" rule of value announced by this Court in the following cases was departed from: In *Guggenheim vs. Rasquin*, supra, Justice Douglas, speaking for this Court, said:

> "*All of the economic benefits of a policy must be taken into consideration in determining its value for gift tax purposes.*"

The Court then proceeds to discuss what these economic benefits are and concludes that the right to the cash surrender value is only one of such benefits and the policy's value should not be appraised on this alone. After pointing out other such benefits this Court held that:

> "*Cost is cogent evidence of value.*"

In *United States vs. Ryerson*, supra, Justice Douglas, again speaking for this Court, said:

> "*The cost of duplicating the policies at the date of the gifts is, in the absence of more cogent evidence, the one criterion which reflects both the insurance and investment value to the owner.*"

Although these cases were dealing with insurance policies, Petitioner does not believe that this Court intended to limit and restrict this "*economic benefit*" rule of value to them, when the same logic and reasoning make it equally as applicable to the valuation of annuities. Accordingly, Petitioner believes the ruling in said cases applies to the evaluation of annuities also,

but if not, it should be settled by this Court because the question presented is of importance in the administration of the Federal Gift Tax Law and in this Social Security age more and more gifts provide for a retained annuity for the donor. There is no sound and adequate reasons for a different rule of value for annuities. When all of the economic benefits of an annuity are considered, there appears to be much more of value in it than is reflected actuarially by mere money rates and life expectancy which are the two components of the tables. By using the tables, the Commissioner only determined the amount actuarially required for Petitioner to provide himself with $400.00 per month for life, *not* the amount that would be required to have somebody else to provide him with such payments; and the latter, not the former, constitutes what was retained by Petitioner. Accordingly, an annuity has the additional economic benefit of paid-for investment management — the annuitant receiving his payment, net, free of all investment burdens. The annuitant has the economic benefit of being a carefree recipient of his fixed payments without himself having to manage and invest the fund to make the payments possible. These additional economic benefits are what make the annuity in the case at bar worth petitioner's valuation of $93,680.00 instead of the Commissioner's valuation of $58,081.77. The difference between these two figures represents the value of the additional economic benefits Petitioner derives from the annuity above the mere actuarial value of his monthly payments. By freeing himself of investment management, etc., through an annuity, his retained interest had above its actuarial value the additional value of whatever the investment management was worth for his lifetime. The decision below makes Petitioner pay gift taxes on these additional economic benefits retained for himself. The Court of Appeals' decision accordingly departed from this "*economic benefit*" rule of value as laid down by this Court in the *Guggenheim* and *Ryerson*

cases, supra, for the annuitant just as surely gets these other economic benefits not reflected by the table as does a policy holder other economic benefits not reflected by cash surrender value. The same scales used in weighing the value of insurance policies are none the less appropriate for weighing the value of annuities with their other inherent economic benefits not reflected by their actuarial value alone. Petitioner's "*trust company*" annuity has exactly the same "*economic benefits*" as does an identical "*insurance company*" annuity. Then doesn't the Court of Appeals' decision conflict with this Court's "*economic benefit*" rule when it held they do not have the same value, and are not even evidence of each other's value? What better evidence is there of the value of the same package of economic benefits than the "cost of duplicating" the package at the only real market place — insurance companies?

This Court having ruled in the *Guggenheim* and *Ryerson* cases, supra, that the cost of duplicating is, in the absence of more cogent evidence, the one criterion which reflects value, Petitioner submits that his indisputed evidence of the cost of duplicating his annuity at the only available market place established its value, because the Commissioner not only did not (and could not) offer more cogent evidence, but failed to offer any evidence at all, and elected to stand solely on the presumption in his favor. In securing evidence of the "*cost of duplicating*" the annuity, Petitioner resorted to the only real market place for annuities in America — leading insurance companies; and Petitioner submits identical annuities have the same value regardless of where they come from so long as no question of the solvency of the source of payment is injected as a factor of value. The Commissioner was estopped to (and did not) challenge the sufficiency of the trust fund to make the prior annuity payments because he admitted this by assessing a gift tax on the remainder interest. Accordingly, the source of payment not being a factor of value, the trust-fund annuity had

the same value as the same annuity coming from any other source, including insurance companies; and the insurance companies' cost for such an identical annuity was an *"ascertainable standard"* for valuing the annuity. By rejecting this evidence of the cost of duplicating these identical payments, the Court of Appeals in effect ruled that $400.00 per month for the life of petitioner has not the same value when paid by an insurance company as it has when paid by a trustee. Its decision was based on this illogical conclusion, and is illegal, for to apply different rules which result in different values for identical annuities is arbitrary. In the case of *Anna L. Raymond,* 40 B. T. A. 244, affirmed, 114 F (2d) 140, certiorari denied 311 U. S. 710, it was held that the cost of insurance companies' annuities is a proper way to value the same annuity payments when they come from another source; and that case involved a similar valuation question to the case at bar.

Since the question of what criterion should be employed for determining the value of gifts is a question of law, it is submitted that appellate courts are not precluded from substituting their judgment of value for that of the Board, and disposing of the case, where the facts are stipulated. *Powers vs. Commissioner of Internal Revenue,* 312 U. S. 259.

Petitioner having rebutted the Commissioner's valuation with proper evidence of value, the Commissioner's presumption thereupon vanished, and petitioner's evidence became the only evidence before the Court, as presumptions are not evidence and cannot survive cogent rebuttal evidence. *Cases cited* under (b) supra. The rule is succintly stated in *Lunsford vs. Commissioner,* 62 F. (2d) 740, where the Court says:

> *"We have repeatedly held that the taxpayer has made out his case when he has put in proofs clearly and distinctly tending to show a determining fact. * * * the presumption that the Commissioner is right is procedural and cannot survive such proofs unless they are challenged by contrary proofs."*

To the same effect and citing decisions of this Court are:

> *Hemphill Schools vs. Commissioner*, 137 F. (2d) 961 (4)-(5); *Nichols vs. Commissioner*, 44 F. (2d) 157.

A ruling on evidence, or a Statute (or Regulation) that denies and deprives the taxpayer of his constitutional right to a factual determination on the question of taxable value is illegal; and when the Court below rejected Petitioner's evidence, it was in conflict with such decisions of this Court. *Cases cited*, (b) supra. In 12 AM. Jur., Section 625, the author says:

> *"A conclusive presumption or a presumption that operates to deny a fair opportunity to repel it, violates the due process clause. Even a Statute that hurts the evidence that may be offered in rebuttal of the presumption is invalid."*

The decision below is tantamount to holding that the Commissioner's valuation of an annuity cannot ever be rebutted because, if it cannot be rebutted by evidence of the cost of an identical insurance company's annuity, which is the going price at which similar annuities are selling in the market place, then certainly any other evidence, being less cogent, would a fortiori be insufficient.

Petitioner does not believe any language of this Court in *Smith vs. Shaughnessy*, 318 U. S. 176, cited by the Court of Appeals, in any way restricts or qualifies taxpayer's right to rebut the Commissioner's valuation and to a factual determination on the question of value. The case of *McMurtry vs. Commissioner*, (1st Cir. 1953) 203 F. (2d) 659, cited by the Court of Appeals, stands alone if the interpretation given that case below is correct; and it is in conflict with the decision of this Court in *United States vs. Ryerson*, supra. But the Court of Appeals misinterpreted that case by taking the quoted language of Judge Magruder out of context. Unlike the case at bar, the evidence *offered* and relied upon there by both sides was evidence only of actuarial value; that was the only theory of value

urged in the case; and the Court made a factual decision after weighing the insurance companies' actuarial data against that of the Commissioner; for unlike the case at bar, there was evidence of value (actuarial) offered by both sides in that case, and a presumption was not weighed against evidence. So, I submit that what Judge Magruder meant in his discussion was that the insurance companies' prices were not evidence of *actuarial* value because they were "loaded" with other than actuarial matter. He could not have meant, when value is being proved not actuarially but by evidence of "duplicating cost" as in the case at bar, that insurance companies' prices are not evidence of such value. For if the selling price of an insurance company's annuity is not evidence of the value of other identical annuities because the insurance company's price includes a commission, would not the cost price of most things changing hands in commerce have to be rejected as evidence of their value for the same reason? The only evidence offered by either side on the value of Petitioner's retained interest was that of the cost of duplicating it at the only place where it could be duplicated. Petitioner submits the sufficiency of this was settled by this Court in the *Ryerson* case, supra.

The Court of Appeals may have been further persuaded by the last sentence of the second paragraph quoted from Judge Magruder's opinion to make what it thought to be an expedient decision to prevent a loss of tax revenue. But such zeal is not necessary in this kind of gift because it is subject to full inheritance taxes, taking effect at donor's death. Furthermore, such expediency is in conflict with the decision of this Court in *Heiner vs. Donnan*, supra, where at Page 325, the Court said:

> *"This is very near to saying that the individual may be stripped of his constitutional rights in order to further a more thorough enforcement of the tax — a new and startling doctrine, condemned by its mere statement and distinctly repudiated by this Court. . . ."*

This Court has consistently held that tax laws, regulations,

assessments and enforcement machinery, including evidence, are not immune to the Fifth Amendment but must at every stage meet the test of due process of law, which includes the right of a fair trial on all issues of fact including taxable value. The decision below restricted Petitioner in this right. The trial Court did not have a choice, in its finding of fact, between Petitioner's and Commissioner's valuations because the Commissioner offered no evidence either to sustain his valuation or to rebut Petitioner's. Accordingly, since Petitioner's evidence on the "cost of duplicating" the annuity was relevant and cogent (this Court said so in the *Ryerson* case, supra), Petitioner's valuation should have prevailed, not on the illegal theory that it out-weighed the Commissioner's presumption in a fact finding proceeding, but because it dispelled said presumption altogether and thereby became the only evidence on value before the Court. It is submitted that when Petitioner's retained interest is computed under this Court's "economic benefit" rule of value, the resulting value of the gift is the amount returned by Petitioner; and the Court of Appeals in sustaining the Tax Court departed from said decisions of this Court both on taxable value and on what constitutes due process of law in establishing it.

The opinion below was devoted almost entirely to sustaining the tables, but this was only an advance guard skirmish for the very most aid that upholding the tables gave the Commissioner was to give his valuation a procedural presumption of correctness which was *not* evidence, and when his valuation was rebutted by Petitioner's evidence of the "cost of duplicating" the annuity, the presumption vanished and the Commissioner had to fight out the issue of value with evidence, or lose. He offered no evidence but tried to survive on his raft of presumption which disappeared and left him helpless. Under the foregoing decisions of this Court and due process of law, Peti-

tioner's evidence alone survived and Petitioner should have prevailed.

Conclusion

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,
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APPENDIX

IN THE
United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 15922

JAMES RICHARD BOWDEN,
Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petition for Review of Decision of The Tax Court of the United States (District of Georgia).

(June 30, 1956.)

Before TUTTLE, CAMERON and JONES, Circuit Judges.

JONES, Circuit Judge: The petitioner, James Richard Bowden, herein called the taxpayer, and his two sisters, in 1950, created an irrevocable trust by a written agreement with Trust Company of Georgia. The donors transferred to the trustee assets of a value of slightly more than $300,000. The contribution of the taxpayer to the trust res was of the value of $100,392.48. The taxpayer was then fifty-two years of age. The trust agreement provided for payment of $400.00 per month

to each donor for life. The rights to these payments inured, upon the death of a donor, to his or her lineal heirs with gifts over if no lineal heirs survived. The agreement provided that the trust is to terminate a year after the death of the last surviving donor. Other provisions of the agreement are not material to the issue presented on appeal.

The taxpayer returned for Federal gift tax the remainder after his equitable life interest in the trust. In valuing the remainder the taxpayer assigned a value to the life interest, deducted it from the amount of the assets transferred to the trustee, and reported the difference as the value of the remainder. The taxpayer showed that he might have purchased from an insurance company an annuity which, at his age, would return to him $400.00 per month for his lifetime, at a cost of $93,680. Using this amount as the value of the life interest, the remainder after his death would have a value of $6,712.48. This figure was claimed by the taxpayer to be the value of his taxable gift. The Commissioner, by using the actuarial tables set out in Regulation 108, §86.19(f), §86.19(g), found the life interest value to be $58,081.77, and valued the taxable remainder at $42,310.71. The Commissioner determined a tax deficiency and the Tax Court sustained the Commissioner's determination. The taxpayer has appealed.

By the Internal Revenue Code it was provided:

> "If the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift." §1005 Int. Rev. Code, 1939, 26 U.S.C.A. §1005.

The controversy here centers around the regulations[1] promulgated by the Commissioner and the proper construction and

[1] "(a) *General.*—The statute provides that if the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift. The value of the property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell. The value of a particular kind of property is not to be determined by a forced sale price. Such value is to be de-

termined by ascertaining as a basis the fair market value at the time of the gift of each unit of the property. For example, in the case of shares of stock or bonds, such unit of property is a share or a bond. All relevant facts and elements of value as of the time of the gift should be considered.

* * * * *

"(f) *Annuities, life estates, remainders and reversions; gifts made after December 31, 1951—(1) In General.*—Annuities purchased from life insurance companies, or other companies regularly engaged in issuing annuity contracts and life insurance policies are to be valued as explained in paragraph (i) of this section. Except with respect to the aforementioned annuity contracts and insurance policies, the values of annuities, life estates, remainders, and reversions are to be computed by the methods hereinafter prescribed in this paragraph. Where the donor transfers property in trust or otherwise and retains an interest therein, the value of the gift is the value of the property transferred less the value of the donor's retained interest. Where the donor assigns or relinquishes an annuity, life estate, remainder, or reversion which he holds by virtue of a transfer previously made by himself or another, the value of the gift is the value of the interest transferred. In either case the present worth of the interest to be valued is to be computed with the use of Table I or Table II of this paragraph if it is dependent upon the continuation of, or termination of the life of one person or upon a term-certain. If such interest is dependent upon more than one life or there is a term-certain concurrent with one or more lives, see subparagraph (5) of this paragraph. For the purpose of the computation the age of a person is to be taken as the age of that person at his nearest birthday.

"(2) *Annuities.*—(i) *Payable annually at end of year.*—If the annuity is payable annually at the end of each year during the life of an individual, the amount payable annually should be multiplied by the figure in column 2 of Table I opposite the number of years in column 1 nearest the age of the individual whose life measures the duration of the annuity, or if payable for a definite number of years the amount payable annually should be multiplied by the figure in column 2 of Table II opposite the number of years in column 1.

* * * * *

"(ii) *Payable at end of annual, semi-annual, quarterly, monthly or weekly period.*—If the annuity is payable at the end of semi-annual, quarterly, monthly, or weekly periods, the value should be determined by multiplying the aggregate amount to be paid within a year by the figure in column 2 of Table I opposite the number of years in column 1 nearest the actual age of the person whose life measures the annuity, or the figure in column 2 of Table II opposite the number of years the annuity is payable, as the case may be, and then multiplying the product by 1.0171 for weekly payments, by 1.0159 for monthly payments, by 1.0130 for quarterly payments, or by 1.0087 for semi-annual payments.

* * * * *

"(g) *Annuities, life estates, remainders and reversions; gifts made prior to January 1, 1952.*—In the case of gifts made prior to January 1, 1952, the general principles and methods prescribed in paragraph (f) of this section (with one exception set forth in the next paragraph) are to be followed but the present worth of the interest to be valued is to be computed with the use of Table A or Table B (which appear at the end of this section) and if neither table is applicable the computation is to be made upon the basis of the Actuaries' or Combined Experience Table of Mor-

application to be placed upon them. At the outset, the taxpayer challenges the provision of the regulation which provides that, "Where the donor transfers property in trust or otherwise and retains an interest therein, the value of the gift is the value of the property transferred less the value of the donor's retained interest." This, says the taxpayer, is an attempt of the Commissioner to promulgate by regulation a rule which may require, and in his case does require, a finding contrary to the existing facts and an unconstitutional invasion of the judicial province of factual determination. The taxpayer sets out nine items of costs and charges to be borne in the administration of the trust and says that these items should be considered as factors in reaching the value of the trust remainder. Among these are trustee's fees. The trustee's fees, and provisions as to payment thereof from principal or income, are set forth in a schedule annexed to the trust agreement. This schedule incorporates an agreement between the donors and the trustee that the fees and the source of their payment will be adjusted from time to time. Hence trustee's fees cannot be accurately computed and cannot be considered as an element of value. Insurance premiums are noted as an expense of the trust but as all of the initial trust assets were intangible assets the need for insurance is not shown. Brokers' commissions, designated as trust expense, cannot even be estimated, and court costs and attorneys' fees seem too remote for consideration. Ad valorem and intangible taxes are other items that are, at best, speculative in amount. This is particularly true where different types of intangibles are taxed at varying rates and some are

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tality, as extended, and interest at the rate of 4 per cent a year, compounded annually. In the computation of the value of annuities the factors 1.01820 for monthly payments, 1.01488 for quarterly payments, and 1.00990 for semi-annual payments are to be substituted for the factors appearing in (f)(2)(ii) of this section; * * *

* * * * *

"(j) *Other property.*—Any property not specifically treated in this section should be valued in accordance with the rule laid down under (a) hereof." Reg. 108, §86.19(a), (f)(1), (f)(2)(i), (f)(2)(ii), (g), (j), as amended by T.D. 5902, 1952-1 C.B. 167.

not taxed at all. Ga. Code Ann. §§92-114 et seq, 92-161 et seq. Without deciding whether these cost and expense charges are proper factors to be included in ascertaining the value of a gift of a trust remainder after a reserved life interest, we do conclude that no basis is shown for a reckoning of any such factors. It may be noted, however, that the Supreme Court of the United States has said that the purposes of the Act were carried out by regulations which "made specific provisions for application of the tax to, and determination of the value of, 'a remainder * * * subject to an outstanding life estate'." *Smith v. Shaughnessy*, 318 U. S. 176, 63 S. Ct. 545, 87 L. Ed. 690.

The taxpayer, having concluded that the provisions of Reg. 108, §86.19(f) and (g) are invalid as applied to his situation, invokes §86.19(j) to avail himself of the principles of §86.19(a). To find all relevant facts and elements of value which, under §86.19(a), should be considered, the taxpayer would not look elsewhere than to the cost of an annuity of $400 per month to be issued by a life insurance company on the theory that such cost is based not only upon actuarial data and anticipated investment yields accurately computed but also properly estimates the cost and expense elements. It was not shown and cannot be assumed that the amount which insurance companies charge for annuities are, substantially, the amount required to cover the obligations incurred under their annuity contracts. It is argued by the taxpayer, but no facts supporting the argument are shown, that the costs, charges and expenses of administering a trust would be essentially the same in the trust as in an annuity. The taxpayer takes for granted that investment yields under the management of a trustee would be the same as that produced by an insurance company. But the experience of neither is disclosed of record. The taxpayer affirms that unless it can be said that the trustee, Trust Company of Georgia, can "beat the investment and experience record" of the insurance companies then annuity cost should be taken as the value of

the retained interest. But can it be said that the trustee may not invest at higher yields than the insurance companies would produce? It may be observed that the taxpayer's trustee has been given "full power and authority * * * to * * * invest and reinvest * * * as and when it deems advisable * * * irrespective of the laws of Georgia governing the investment of trust funds; * * * said Trustee may * * * invest and reinvest the property belonging to said trust in the same manner as if it were the absolute owner thereof, any law of the State of Georgia to the contrary notwithstanding." We cannot say that it would be impossible for the trustee, in the exercise of its broad discretionary investment powers, to secure for the trust a yield in excess of that which would be returned upon insurance company investments. And, as has been said by the Court of Appeals, Ninth Circuit:

> "Annuitants, as a rule, are a self-selected group, and the experience that insurance companies have in respect of their mortality rate is not the same experience that they have with the average run of persons. From this we understand that annuity mortality tables do not purport to reflect the general mortality experience but only the experience of a more or less limited group who, so to speak, bet against the insurance companies that they will outlive the normal expectancy." *Koshland's Estate v. Commissioner,* 9 Cir. 1949, 177 F. 2d 851.

In ascertaining the cost basis of annuities purchased by a taxpayer from charities, where the sums paid were substantially more than the amount for which annuities could have been acquired from insurance companies, the Board of Tax Appeals apparently held that the value would be that for which insurance companies would issue annuity contracts, and the remainder of the payments would be regarded as gifts. Anna L. Raymond, 1939, 40 B.T.A. 244. A rule applied in determining the cost basis of an annuity purchase is not persuasive in a case where the taxpayer has created a trust.

The taxpayer urges that the annuity tables incorporated in

the regulation at the time of the gift were outmoded, and that since the tables were constructed life expectancy has increased and the return upon investments has decreased. This, said the taxpayer, is demonstrated by the adoption by the Treasury Department of new tables effective as of December 31, 1951,[2] five months after the making of the gift here considered. The Tax Court disposed of the taxpayer's contention that the table was outmoded and untrue by the statement that, "No evidence was introduced on this point." The Court of Appeals of the First Circuit, in 1953, after the new table had been adopted, applied the earlier tables in valuing the remainder interest of a trust created in 1942. The same theory of valuation was urged there as here, that is, to deduct the amount which an insurance company would charge to provide the life interest benefits from the value of the trust estate. For the Court, Judge Magruder said:

> "It seems clear that this method of calculation used by petitioner was improper, since there is a 'loading factor' (representing the company's commissions and other expenses) included in every commercial insurance company's premiums. It was also improper since the lower interest rates used by most of these insurance companies are largely due to the fact that their investments are usually considerably restricted by state law."
>
> * * * * *
>
> "We think, therefore, that tables which have enjoyed such widespread and long-standing use should not be rejected as wholly unreasonable, even though they may perhaps be susceptible of minor improvements in particular respects. Such discrepancies as may exist will no doubt average out in the long run; and while this may sometimes prove to be unfortunate for individual taxpayers, the discrepancies may have to be suffered in the interest of a simplified overall administration of the tax laws."
>
> * * * * *
>
> "We do not think that the Tax Court erred in accepting the 4 per cent interest factor used by the Commis-

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2 T.D. 5902, C.B. 1952-1, p. 167.

sioner. The evidence indicated that virtually all the states in 1942 used an interest factor of 4 per cent or even higher for inheritance tax purposes. Moreover, in view of the broad investment powers conferred upon the trustees in the two Louise Trusts, it would perhaps not be unreasonable to anticipate a 4 per cent average yield. We think that petitioner was in no way prejudiced by the use of the 4 per cent interest rate." *McMurtry v. Commissioner,* 1st Cir., 1953, 203 F. 2d 659.

In the foregoing case, Judge Woodbury declined to go with majority and thus expressed his own views:

"I quite agree that this case must be remanded to the Tax Court for further proceedings. But in doing so I would condemn as arbitrary and capricious the use of tables compiled in 1836 resting upon experience with the life span of insured English males as the basis for computing the life expectancy of two American females a century or so later." 203 F. 2d 667.

We do not hold that the tables have, by reason of long standing and frequent application, attained the dignity and force of law. The Commissioner has conceded, at least in one case, that the 4% rate is not proper in all cases. Estate of Irma E. Green, 1954, 22 T. C. 728. So it seems, the correctness of actuarial data might be shown to be erroneous. The Supreme Court has taken judicial notice that 4% was, in 1920, generally assumed to be the earning power of money safely invested. *Simpson v. United States,* 252 U. S. 547, 40 S. Ct. 367, 64 L. Ed. 709. We shall not hold it is now more than a skilled and experienced trustee might produce under unlimited discretionary investment powers. Cf. *United States v. Puscedu,* 5th Cir. 1955, 224 F. 2d 5.

The determination of a deficiency by the Commissioner is prima facie correct and the burden is on the taxpayer to prove it is wrong. *Kilpatrick v. Commissioner,* 5th Cir. 1955, 227 F. 2d 240. Cf. *Commissioner v. Disston,* 325 U. S. 442, 65 S. Ct. 1338, 89 L. Ed. 1720, 158 A.L.R. 166; *Laughinghouse v. Commissioner,* 5th Cir. 1955, 227 F. 2d 477. As we have shown, the burden has

not been met by a showing of the cost of an annuity from an insurance company. The decision of the Tax Court is

AFFIRMED.

JUDGMENT

Extract from the Minutes of June 30th, 1956

JAMES RICHARD BOWDEN,

No. 15922 **versus**

COMMISSIONER OF INTERNAL REVENUE

This cause came on to be heard on the petition of James Richard Bowden for a review of a decision of The Tax Court of the United States, and was argued by counsel;

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Tax Court in this cause be, and the same is hereby, affirmed.

A True Copy:
Teste:

Seal of
U. S. Court of Appeals
Fifth Circuit

JOHN A. FEEHAN, JR., *Clerk*
By CLARA R. JAMES, *Deputy*
Clerk of the United States Court of
Appeals for the Fifth Circuit.

Certificate of Service

It is hereby certified that service of copies of the foregoing petition has been made by mailing same by air-mail, postage prepaid, to opposing counsel of record, at his P. O. address, and to the Solicitor General, Department of Justice, Washington 25, D. C., in accordance with the Rules of this Court.

Dated 18 *day of* Sept., *1956.*

J. RICHARD BOWDEN
Counsel for Petitioner

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 436

JAMES RICHARD BOWDEN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Tax Court (R. 68–74) is a memorandum opinion not officially reported. The opinion of the Court of Appeals (Pet. 12–20) is reported in 234 F. 2d 937.

JURISDICTION

The judgment of the Court of Appeals (Pet. 20) was entered on June 30, 1956. A petition for rehearing was denied on July 28, 1956. (Pet. 2.) The petition for a writ of certiorari was filed on September 19, 1956. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether the court below properly decided that, on the record, the Tax Court arrived at a correct valuation of a life interest in certain trust property.

STATUTE AND REGULATIONS INVOLVED

Section 1005 of the Internal Revenue Code of 1939 and Section 86.19 (a), (f), (g), (i) and (j) of Treasury Regulations 108 are set forth in the Appendix, *infra,* pp. 9–12.

STATEMENT

The facts as stipulated and found by the Tax Court (R. 26–67) may be summarized as follows:

On July 29, 1950, the taxpayer and his sisters entered into a trust agreement with the Trust Company of Georgia, Atlanta, Georgia, as trustee, delivering to the trustee personal property consisting of funds and securities having an aggregate value of $301,177.43 to be held and administered in accordance with the provisions of the trust agreement. One-third of that amount, or $100,392.48, belonged to the taxpayer, who was 52 years old at the time of the transfer. (R. 27.)

The trust indenture gave the trustee power to invest and reinvest without regard to any restriction imposed by law on trustees in Georgia; and the trustee was authorized to hold, manage and control the trust property in the same manner as if it were the absolute owner thereof, any law of Georgia to the contrary notwithstanding. (R. 29–30.)

The primary beneficiaries (taxpayer and his two sisters) were each entitled to receive $400 per month

for life, and upon death of any one of them the payments were to be made to his or her lineal heirs. The trust was to continue until one year after the death of the last surviving primary beneficiary, at which time the corpus, if any should remain, was to be distributed to the lineal heirs of the primary beneficiaries, *per stirpes*. There were alternative provisions for distribution in the event any primary beneficiary should die leaving no lineal heirs. (R. 32–34.)

On March 9, 1951, the taxpayer filed a gift tax return for the calendar year 1950, reporting a gift of $6,320 resulting from the above-described transfer in trust. He reached that figure by deducting from $100,000, the amount alleged to have been transferred by him, the sum of $93,680 which it would have cost him to purchase a life annuity paying $400 per month from the Prudential Insurance Company of America. He then treated one-half of the $6,320, or $3,160, as taxable to him since he and his wife, Margaret, elected to have gifts treated as taxable one-half to each of them. See Section 1000 (f) of the Internal Revenue Code of 1939, as added by Section 374 of the Revenue Act of 1948, c. 168, 62 Stat. 110. (R. 27, 46–47, 60–61.)

The Commissioner, in determining the deficiency, increased the value of the transferred property from $100,000 to $100,392.48, and reduced the value of the donor's retained interest from $93,680 to $58,081.77. He thus determined the amount of the gift to be $42,310.71, one-half of which ($21,155.35) was considered to have been made by taxpayer and one-half by his wife. (R. 10–11, 68, 71–72.) The Commis-

sioner arrived at the figure of $58,081.77 (the value of the life annuity retained by the taxpayer) as follows (R. 11):

> The value of the life annuity has been computed in accordance with the provisions of section 86.19 (f) of Regulations 108, as the product of $400.00 (monthly payments), 12 (number of months in a year), 11.88408 (factor for age 52) and 1.01820 (factor for monthly payments).

The taxpayer appealed to the Tax Court which sustained the Commissioner's determination. (R. 73.) The taxpayer filed a motion with the Tax Court for reconsideration, which was denied (R. 75). Thereupon, a petition for review was filed with the Court of Appeals for the Fifth Circuit (R. 89), which affirmed the decision of the Tax Court on the ground that the taxpayer failed to meet the burden of showing that the Commissioner's valuation was wrong (Pet. 12–20). The taxpayer filed a petition for rehearing, which was denied on July 28, 1956. (Pet. 2.)

ARGUMENT

1. The decision of the Court of Appeals, affirming the memorandum decision of the Tax Court, is correct. On July 29, 1950, the taxpayer, aged 52, transferred in trust property valued at $100,392.48, reserving to himself the payment of $400 per month for life, with remainders over. (R. 68–69.) The question involved is the valuation, for gift tax purposes, of the remainder interest. In valuing a remainder subject to an outstanding life estate, as in the present case,

the value of the gift is the value of the property transferred less the value of the donor's retained interest. Section 86.19 (f) of Treasury Regulations 108 (Appendix, *infra,* pp. 9–11); *Smith* v. *Shaughnessy,* 318 U. S. 176, 180–181. Accordingly, the first step is to ascertain the value of the decedent's right to receive $400 per month for the remainder of his life.

Paragraphs (f) and (g) of Section 86.19 of Treasury Regulations 108 (Appendix, *infra,* pp. 9–12) provide, in part, that in the case of gifts made prior to January 1, 1952, the present worth of an annuity (which is not purchased from a company regularly engaged in issuing such contracts) is to be computed with the use of Table A; and in the valuation of annuities the factor 1.01820 is to be used for monthly payments. By using the last-mentioned factor and the factor 11.88408 in Table A for the taxpayer's age, 52, and by applying these factors to $4,800, the aggregate payments for one year, the Commissioner obtained the value of $58,081.77 for the taxpayer's life interest; then, by subtracting that figure from the value of the property transferred in trust, $100,392.48, he ascertained the value of the remainder to be $42,310.71. (R. 68–69.) The validity of a Treasury regulation similar to that upon which the Commissioner relied in valuing the retained interest of the taxpayer here has been upheld in several cases. See *McMurtry* v. *Commissioner,* 203 F. 2d 659 (C. A. 1st); *Koshland's Estate* v. *Commissioner,* 177 F. 2d 851 (C. A. 9th); *Grant* v. *Smyth,* 123 F. Supp. 771 (N. D. Cal.), affirmed *per curiam,* 226 F. 2d 407 (C. A. 9th).

Both the Tax Court and the Court of Appeals decided that the taxpayer had failed to adduce evidence showing that the Commissioner's method of valuation was wrong. (R. 73–74; Pet. 19–20.) The taxpayer's principal argument is that the best measure of value of his retained interest of $400 per month for life is the cost of an annuity purchased from an insurance company regularly engaged in writing such contracts, and that the stipulated facts show such cost to be about $93,000. (Pet. 4–7.) The answer is that the taxpayer did not purchase an annuity contract from an insurance company, but, instead, created a trust in which he retained a life interest, and that there are substantial differences between an annuity contract purchased from an insurance company and a retained life interest in a trust.

The taxpayer failed to introduce evidence showing how the insurance companies computed the cost of their policies; he did not show which mortality table they used, the rate of interest, loading factor, set-back, etc. The stipulation of facts merely shows the premium charged by two life insurance companies (R. 60–61), and the blank forms for the policies (R. 62–67). We can reasonably assume that it was an annuity table, not a life insurance table, because it is generally known that purchasers of such policies are a select group and outlive the average group shown on life insurance or census tables. See *Koshland's Estate* v. *Commissioner,* 177 F. 2d 851, 852 (C. A. 9th). Therefore the cost of an annuity pur-

chased from an insurance company is not relevant to the cost of an annuity reserved by the settlor of a trust; different mortality tables and different rates of interest are involved; one has a loading factor and set-back and the other has not. It is for that reason that the Treasury Regulations have long provided that annuities not purchased from companies engaged in the business of issuing such contracts are not to be valued in accordance with premium charges for such contracts, but are to be valued in accordance with the tables set forth in the Regulations.

2. There is no conflict in decisions. *United States* v. *Ryerson,* 312 U. S. 260, and *Guggenheim* v. *Rasquin,* 312 U. S. 254 (Pet. 2, 4–6, 9), involved the valuation, for gift tax purposes, of insurance policies issued by companies engaged in the business of issuing such policies. This Court held that the cash surrender value was not the full measure of the value of the policy and that the cost of the policy was a fair measure of its value. These decisions do not touch on the question of the proper valuation of a life interest in a trust, nor are they inconsistent with the decision below, which holds in substance that the premium cost of an annuity policy issued by an insurance company is not, of itself, conclusive evidence of the value of such a life interest. Nor was such an issue presented to or passed on by the Court of Appeals in *Raymond* v. *Commissioner,* 114 F. 2d 140 (C. A. 7th), affirming 40 B. T. A. 244, certiorari denied, 311 U. S. 710. (Pet. 7.)

Finally, it is clear that the taxpayer, in being required to sustain his burden of proof in the Tax Court, was not being deprived of any constitutional guaranties. The taxpayer's contrary arguments (Pet. 2, 7–11) are without merit.

CONCLUSION

The decision of the court below is correct. There is no conflict of decisions, and there are no other reasons which would warrant further review of the case. The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
HILBERT P. ZARKY,
MORTON K. ROTHSCHILD,
Attorneys.

OCTOBER 1956.

APPENDIX

Internal Revenue Code of 1939:

> SEC. 1005. GIFTS MADE IN PROPERTY.
>
> If the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift.
>
> (26 U. S. C. 1952 ed., Sec. 1005.)

Treasury Regulations 108, promulgated under the Internal Revenue Code of 1939:

> SEC. 86.19 *Valuation of Property.*—(a) *General.*—The statute provides that if the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift. The value of the property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell. The value of a particular kind of property is not to be determined by a forced sale price. Such value is to be determined by ascertaining as a basis the fair market value at the time of the gift of each unit of the property. For example, in the case of shares of stock or bonds, such unit of property is a share or a bond. All relevant facts and elements of value as of the time of the gift should be considered.
>
> * * * * *
>
> (f) [As amended by T. D. 5902, 1952–1 Cum. Bull. 167] *Annuities, life estates, remainders, and reversions; gifts made after December 31, 1951.*—(1) *In general.*—Annuities purchased from life insurance companies, or other companies regularly engaged in issuing annuity

contracts, and life insurance policies are to be valued as explained in paragraph (i) of this section. Except with respect to the afore-mentioned annuity contracts and insurance policies, the values of annuities, life estates, remainders, and reversions are to be computed by the methods hereinafter prescribed in this paragraph. Where the donor transfers property in trust or otherwise and retains an interest therein, the value of the gift is the value of the property transferred less the value of the donor's retained interest. Where the donor assigns or relinquishes an annuity, life estate, remainder, or reversion which he holds by virtue of a transfer previously made by himself or another, the value of the gift is the value of the interest transferred. In either case the present worth of the interest to be valued is to be computed with the use of Table I or Table II of this paragraph if it is dependent upon the continuation of, or termination of the life of one person or upon a term-certain. If such interest is dependent upon more than one life or there is a term-certain concurrent with one or more lives, see subparagraph (5) of this paragraph. For the purpose of the computation the age of a person is to be taken as the age of that person at his nearest birthday.

(2) *Annuities.*—(i) *Payable annually at end of year.*—If the annuity is payable annually at the end of each year during the life of an individual, the amount payable annually should be multiplied by the figure in column 2 of Table I opposite the number of years in column 1 nearest the age of the individual whose life measures the duration of the annuity, or if payable for a definite number of years the amount payable annually should be multiplied by the figure in column 2 of Table II opposite the number of years in column 1.

* * * * *

(ii) *Payable at end of semiannual, quarterly, monthly, or weekly periods.*—If the annuity is payable at the end of semiannual, quarterly, monthly, or weekly periods, the value should be determined by multiplying the aggregate amount to be paid within a year by the figure in column 2 of Table I opposite the number of years in column 1 nearest the actual age of the person whose life measures the annuity, or the figure in column 2 of Table II opposite the number of years the annuity is payable, as the case may be, and then multiplying the product by 1.0171 for weekly payments, by 1.0159 for monthly payments, by 1.0130 for quarterly payments, or by 1.0087 for semiannual payments.

* * * * *

(g) [As amended by T. D. 5902, *supra*] *Annuities, life estates, remainders, and reversions; gifts made prior to January 1, 1952.*—In the case of gifts made prior to January 1, 1952, the general principles and methods prescribed in paragraph (f) of this section (with one exception set forth in the next paragraph) are to be followed but the present worth of the interest to be valued is to be computed with the use of Table A or Table B (which appear at the end of this section) and if neither table is applicable the computation is to be made upon the basis of the Actuaries' or Combined Experience Table of Mortality, as extended, and interest at the rate of 4 percent a year, compounded annually. In the computation of the value of annuities the factors 1.01820 for monthly payments, 1.01488 for quarterly payments, and 1.00990 for semiannual payments are to be substituted for the factors appearing in (f) (2) (ii) of this section; * * *.

* * * * *

(i) *Life insurance and annuity contracts.*—The value of a life insurance contract or of a contract for the payment of an annuity issued by a company regularly engaged in the selling of contracts of that character is established through the sale of the particular contract by the company, or through the sale by the company of comparable contracts. * * *

(j) *Other property.*—Any property not specifically treated in this section should be valued in accordance with the rule laid down under (*a*) hereof.

* * * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM 1956

NO. 436

JAMES RICHARD BOWDEN,
Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Motion for Rehearing on Order Denying Certiorari

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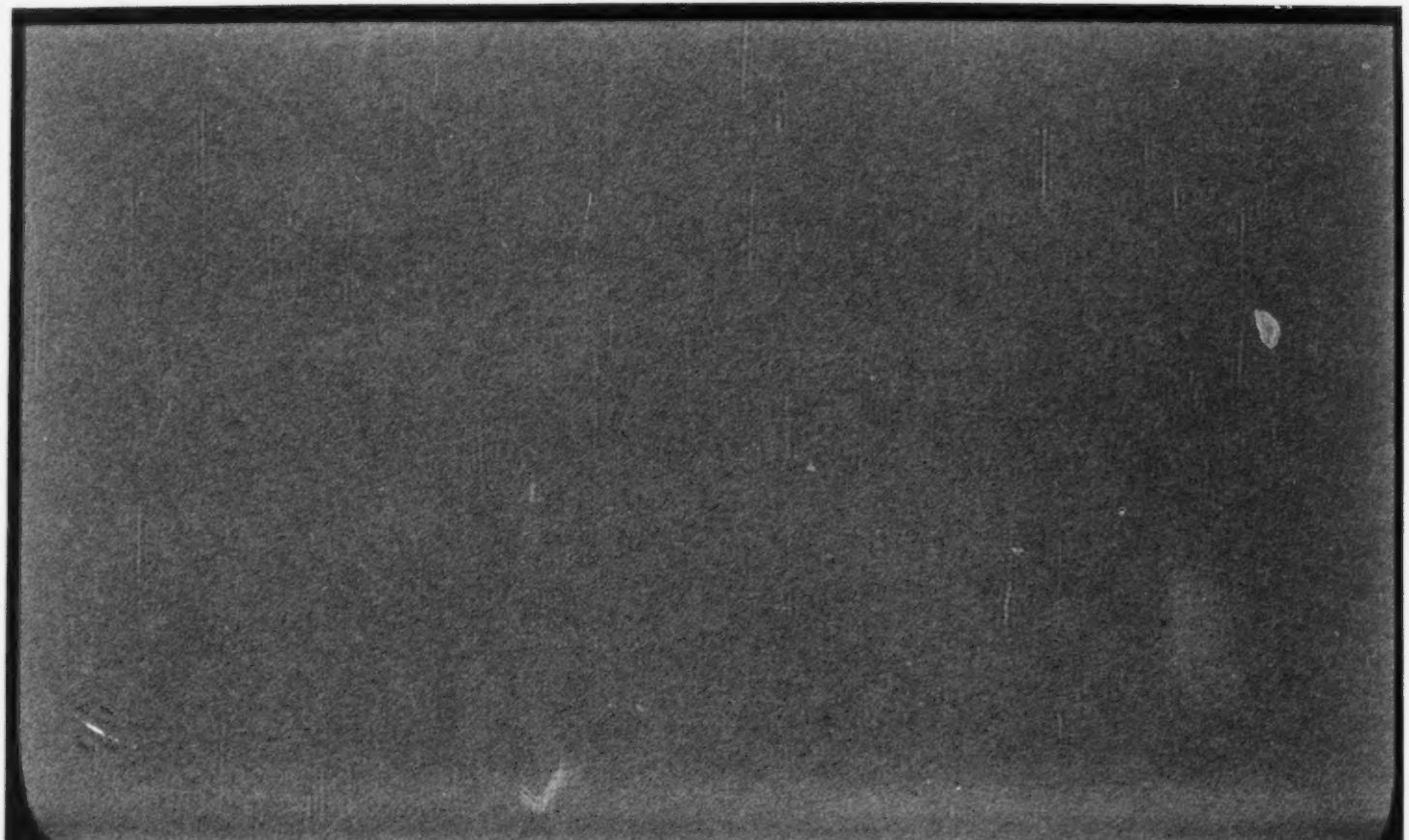

IN THE

Supreme Court of the United States

OCTOBER TERM 1956

NO. 436

JAMES RICHARD BOWDEN,
Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Motion for Rehearing on Order Denying Certiorari

Petitioner respectfully moves for a Rehearing on the Court's order, dated November 19, 1956, denying his petition for Certiorari, because,

For gift tax purposes Petitioner undertook to prove the value of an annuity payable by a trustee by offering evidence (stipulated) of the cost of an identical insurance company annuity, because identical payments have the same values. The Courts below rejected this evidence of the cost of duplication as insufficient and sustained the Commissioner's valuation *solely* on his prima facie presumption of correctness. Since the presumption had been rebutted with cogent evidence, and the Commissioner offered no evidence, this constituted a judgment against taxpayer without any evidence to support it. The case involves *only* a point of law, but affects the rights of all taxpayers.

Petitioner submits that conflicting decisions in other circuits are unlikely to arise because in cases involving large taxpayers the Commissioner would most certainly always meet evidence with evidence and not rely on his presumption alone, and in

cases of small taxpayers the cost of litigation keeps the question out of the Courts. Therefore the decision of the Court of Appeals holding that the Commissioner does not have to meet evidence with evidence would indefinitely remain uncorrected to exert effective pressure on taxpayers to surrender to what amounts to a denial of a fair trial on the correctness of an assessment. Because of the unlikelihood of this Court having an occasion to correct this error in the near future Petitioner makes this motion for Rehearing relying on the authority of *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U. S. 47, 50, of Rule 58(2) of Revised Rules of this Court where this Court granted a rehearing because it was unlikely a conflict would soon arise in another circuit in a case of national importance.

Petitioner realizes that a tax against him is not even of local importance, yet the weighing of a procedual presumption against cogent evidence which results in a Federal Tax judgment without any evidence to support it is of grave consequence and of nationwide concern to millions of taxpayers.

Respectfully submitted,

J. RICHARD BOWDEN
Attorney for Petitioner
214 Grant Building
Atlanta 3, Georgia

Certificate

It is hereby certified that the within motion is presented in good faith and not for delay, and is restricted to the ground for rehearing covered by *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U. S. 47, 50 supra; and service of four copies of this motion has been made on the Solicitor General and on opposing counsel by air mail, postage prepaid, in accordance with the rules of this Court.

Dated: December 12th, 1956.

J. RICHARD BOWDEN
Attorney for Petitioner